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May 13, 1997

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: Amendment of Section 73.202(b) FM Table of  
Allotments (Fredonia, Kentucky)  
(MM Docket No. 97-66; RM-8997)

Dear Mr. Caton:

Transmitted herewith on behalf of JoeMyers Productions is an original and four copies of its Opposition to Informal Objection in the rule making proceeding to allot FM Channel 221A to Fredonia, Kentucky. This petition is respectfully directed to the Chief, Allocations Branch.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,



John F. Garziglia

Enclosure

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Before the  
Federal Communications Commission  
Washington, D.C. 20054

RECEIVED  
MAY 13 1997

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
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Amendment of Section 73.202(b) ) MM Docket No. 97-66  
Table of Allotments, ) RM-8997  
FM Broadcast Stations )  
(Fredonia, Kentucky) )

To: Chief, Allocations Branch

OPPOSITION TO INFORMAL OBJECTION

JoeMyers Productions, Inc. ("JoeMyers"), by its attorneys, hereby respectfully submits its opposition to the Informal Objection filed by David Glass ("Glass") on May 6, 1997 concerning the allotment of FM Channel 221A to Fredonia, Kentucky.

JoeMyers filed its Petition for Rule Making requesting the institution of rule making proceedings to allot FM Channel 221A to Fredonia, Kentucky as its first local transmission service on December 26, 1996. Subsequently, on February 14, 1997, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on the proposed amendment of the FM Table of Allotments. The NPRM established April 7, 1997 as the deadline for interested parties to file comments and April 22, 1997 as the deadline to file reply comments. On May 6, 1997, one month following the deadline for filing comments (and two weeks after

the deadline for filing reply comments), Glass filed its Informal Objection/Comment.<sup>1/</sup>

The Commission should not accept or consider the Informal Objection/Comment<sup>2/</sup> filed by Glass because it was not timely filed and it is wholly without merit. Although Glass labeled his pleading an "Informal Objection,"<sup>3/</sup> Glass' pleading is actually an untimely filed comment to the NPRM concerning the allotment of FM Channel 221A to Fredonia, Kentucky.<sup>4/</sup> The Informal Objection/Comment is untimely filed since the NPRM established a comment period which ended on April 7, 1997. Glass' Informal Objection/Comment was filed May 6, 1997, one month after the comment deadline specified in the NPRM.

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<sup>1/</sup> The "Informal Objection" filed by Glass will hereinafter be referred to as "Informal Objection/Comment". See infra notes 2-3 and accompanying text.

<sup>2/</sup> The Commission's Rules do not allow informal objections to be filed where formal procedures are required under the Commission's Rules. 47 C.F.R. § 1.41. In the instant rule making proceeding, the Commission released the NPRM concerning the allotment of Channel 221A to Fredonia, Kentucky on February 14, 1997 ("NPRM") (attached hereto as Exhibit 1).

<sup>3/</sup> There is no basis upon which Glass may file an informal objection in this or any other allotment (rule making) proceeding. Glass asserts that the filing of his "Informal Objection" is proper pursuant to 47 C.F.R. § 73.3587. However, Section 73.3587 of the Commission's Rules has nothing to do with the instant allotment proceeding. 47 C.F.R. § 73.3587. Although Section 73.3587 is entitled "Procedure for Filing Informal Objections," it only addresses informal objections regarding a grant of "any application for an instrument of authorization." Id. Section 73.3587 is not applicable to the instant rule making proceeding. Id. Thus, Glass has no authority to file an informal objection.

<sup>4/</sup> See supra notes 1-3.

Even Glass admits to the untimeliness of his filing. Glass states in his Informal Objection/Comment that he was precluded from filing his Informal Objection/Comment by the comment deadline set by the NPRM. Exhibit 1, note 1. The Commission's Rules specifically states that "[n]o additional comments may be filed [after the time specified in the NPRM] unless specifically requested or authorized by the Commission." 47 C.F.R. § 1.415(d). In the instant case, Glass did not file either a motion for extension of time as required by Section 1.46(b) of the Commission's Rules or a request for acceptance of late-filed comments. Thus, Glass' Informal Objection/Comment was untimely filed and the Commission should not now accept or consider it in the rule making proceeding to allot Channel 221A to Fredonia, Kentucky. See e.g., Windcrest and Hondo, Texas, 5 FCC Rcd 1123, note 2 (1990) (late-filed comments not accepted pursuant to Sections 1.415(d) and 1.420(d) of the Commission's Rules).

Glass' Informal Objection/Comment is also wholly without merit. It is well established that at the rule making stage, the Commission does not require a detailed showing regarding the availability or suitability of a specific transmitter site. See e.g., Key West, Florida, 3 FCC Rcd 6423, para. 4 (1988); Manitowoc and Two Rivers, Wisconsin, 11 FCC Rcd 14569, para. 5 (1996). The only requirement at this stage is that the proposed community receive an adequate signal from an identified area that

meets the Commission's spacing rules.<sup>5/</sup> In the instant rule making proceeding, the Commission's engineering analysis "determined that Channel 221A can be allotted to Fredonia in compliance with the Commission's minimum distance separation requirements...." Exhibit 1 at para. 3. Therefore, the required showing of the Commission's spacing and technical requirements has been met and the Commission may properly allot Channel 221A to Fredonia, Kentucky.

In addition to being untimely and without merit, Glass' Informal Objection/Comment should not be accepted or considered by the Commission because the documents submitted in support of the Informal Objection/Comment are deficient. Contrary to Glass' statement that he "obtained signed statements from the three landowners who own all of the land within the permissible area," Glass did not obtain statements from all of the landowners. Lori Myers Arnold, William Ralph Paris, Dietra Paris, and George Ann Phelps, are all identified by Mr. William Ralph Paris (one of the owners and the land surveyor hired by Glass), as joint owners of the land referenced in Glass' Informal Objection/Comment. See Informal Objection/Comments, attachment 1. Thus, Glass' claim that "no property owner...would consider permitting the erection of a tower" cannot be substantiated. One of these owners, for

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<sup>5/</sup> Issues concerning the availability and/or suitability of a transmitter site are more properly addressed in connection with an application for a construction permit. 3 FCC Rcd 6423 at para. 4; 11 FCC Rcd 14569 at para. 5.

example, may not be opposed to having a transmitter located on their land.<sup>6/</sup>

The Informal Objection/Comment is also deficient because Section 1.16 of the Commission's Rules requires that any document filed with the Commission be "supported, evidenced, established or proved by a written sworn declaration, verification, certificate, statement, oath or affidavit...." 47 C.F.R. §1.16.<sup>7/</sup> However, neither the letter from the land surveyor (William Ralph Paris) nor the three statements from the landowners (Barry Phelps, Andrew Arnold, and Pansy Paris) submitted by Glass contains such a statement. See Informal Objection/Comment, attachments 2 - 5. Further, none of the statements from the landowners are dated. Accordingly, the documents attached to support Glass' Informal Objection/Comment do not meet the requirements of Section 1.16 of the Commission's Rules.

The Commission should not accept or consider Glass' Informal Objection/Comment for several reasons. Glass had no authority to file an informal objection in the instant rule making proceeding. Further, Glass' Informal Objection/Comment was filed one month after the deadline specified in the NPRM. Finally, Glass' Infor-

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<sup>6/</sup> As explained above, at the rule making stage, the Commission does not require a showing of the availability and/or suitability of a transmitter site. See supra.

<sup>7/</sup> Section 1.16 of the Commission's Rules mandates that such declaration must be subscribed by the declarant as true under penalty of perjury and dated. The declaration must be in substantially the following form if executed within the United States "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)." 47 C.F.R. §1.16.

mal Objection/Comment is wholly without merit. Accordingly, the Informal Objection/Comment filed by David Glass should not be considered in this rule making proceeding.

Sincerely,

**JOEMYERS PRODUCTIONS, INC.**

By: 

John F. Garziglia  
Patricia M. Chuh  
Its Attorneys

**PEPPER & CORAZZINI, L.L.P.**  
1776 K Street, N.W., Suite 200  
Washington, D.C. 20006  
(202) 296-0600

May 13, 1997





Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) MM Docket No. 97-66  
Table of Allotments, ) RM-8997  
FM Broadcast Stations. )  
(Fredonia, Kentucky) )

NOTICE OF PROPOSED RULE MAKING

Adopted: February 7, 1997;

Released: February 14, 1997

Comment Date: April 7, 1997

Reply Comment Date: April 22, 1997

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by JoeMyers Productions, Inc. ("petitioner"), proposing the allotment of Channel 221A at Fredonia, Kentucky, as the community's first local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that Fredonia has a 1990 U.S. Census population of 470 persons, and that the proposed allotment would provide the community with its first local aural transmission service.

3. We believe the proposal warrants consideration since the proposed allotment of Channel 221A at Fredonia, Kentucky, could provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 221A can be allotted to Fredonia in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.2 kilometers (3.8 miles) northeast to avoid short-spacings to the licensed sites of Station WYNU(FM), Channel 222C, Milan, Tennessee, Station WBKR(FM), Channel 223C, Owensboro, Kentucky, and Station WMJL-FM, Channel 274A, Marion, Kentucky.<sup>1</sup>

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<sup>1</sup>The coordinates for Channel 221A at Fredonia are North Latitude 37-15-22 and West Longitude 88-01-49.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Fredonia, Kentucky	—	221A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before April 7, 1997, and reply comments on or before April 22, 1997, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.  
Pepper & Corazzini, L.L.P.  
1776 K Street, NW., Suite 200  
Washington, DC 20006  
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from

such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

Attachment: Appendix

## APPENDIX

MM Docket No. 97-66  
RM-8997

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the

person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.

CERTIFICATE OF SERVICE

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 13th day of May, 1997, copies of the foregoing Opposition to Informal Objection were mailed, postage prepaid, to the following:

Robert Lewis Thompson, Esq.  
TAYLOR THIEMANN & AITKEN, L.C.  
908 King Street, Suite 300  
Alexandria, VA 22314  
(Counsel for David Glass)

  
Lisa A. Skoritoski